USTELECOM
UNITED STATES TELECOM ASSOCIATION

November 21, 2007

***EX PARTE* NOTICE**

Re: DTV Consumer Education Initiative, MB Dkt. 07-148

Dear Ms. Dortch:

This is to inform you that on November 20, 2007, Sean Lev of the Kellogg, Huber firm, along with the undersigned, represented the United States Telecom Association in a meeting with Commission staff in connection with the proceeding identified above. Commission staff in attendance at this meeting were Matthew Berry, Jacob Lewis, Susan Aaron and Ajit Pai, all of the Office of the General Counsel.

During this meeting, and consistent with its comments in this proceeding, USTelecom expressed concerns about any requirement the Commission might place on its member telephone companies that would force them to distribute to their customers (and pay for such distribution) government-mandated communications concerning the February 2009 DTV transition. Although USTelecom recognizes that there is significant Commission and congressional concern with respect to whether consumers are sufficiently informed about this pending transition, it is hard to see how this concern is ameliorated by requiring telephone companies to distribute to their telephone customers information about this issue through billing inserts or billing messages. Fundamentally more important, however, are the significant Constitutional issues that would be raised by requiring carriers to engage in such content-based speech. USTelecom emphasized that while such mandates could establish an untenable precedent for the Government to require all sorts of political speech, USTelecom and it members were eager to work with the Commission on less intrusive (and more effective) options for ensuring that consumers are informed about the DTV transition.

The First Amendment prevents the Government from compelling individuals to speak. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 713-17 (1977). In *Pacific Gas & Electric v. Public Utilities Commission of California* ("*PG&E*"), for example, the Supreme Court held that the government may not require a utility to include a third party's speech in the utility's customer bills. *See* 475 U.S. 1 (1986) (plurality); *accord id.*, at 25 (Marshall, J., concurring in judgment); *see also Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987) (striking down requirement that utilities include government-dictated message in bills even where it was claimed to be "objective" and "informational").

Any requirement that mandates that telecommunications carriers provide messages regarding the DTV transition to Lifeline and Linkup customer would be unconstitutional under

such precedents. Any requirement of this kind would be content-based, both because the government would be dictating the substance of the communication and because the justification for the requirement would be based on content (*i.e.*, the alleged need to inform individuals regarding the DTV transition). Such content-based regulations are subject to strict scrutiny, which requires that the government's regulations "be narrowly tailored to promote a compelling Government interest," that cannot be served by any "less restrictive alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citation omitted).

The FCC's proposed requirement cannot pass that exacting test. Even assuming that the government has a compelling interest here, the proposed mechanism is not sufficiently tailored, nor is it the least restrictive means. The requirement would be imposed on providers of a service – local telecommunications service – that is not relevant to the DTV transition. Moreover, many of the carriers that would be required to carry this message do not even provide video service, much less is there any reason to believe that the customers that receive these messages receive video service from these carriers. In such circumstances, the requirement is, if anything, likely to lead to substantial confusion. Further, the government has ample alternative means to advance its interest, including through its own speech and by working with the broadcast companies that are providing analog signals and thus are directly implicated in this transition. *See, e.g., Riley v. National Federation of the Blind,* 487 US 781, 800 (1988) (striking down forced speech requirement where the government itself could "communicate the desired information to the public").

For these reasons, and because a violation of First Amendment rights creates irreparable injury, there is a strong basis to believe that a federal court would grant a stay against (and ultimately invalidate) such a requirement if the Commission were to adopt it. *See generally Elrod v. Burns*, 427 U.S. 437, 373 (1976) (plurality) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest . . . favors plaintiffs' assertion of their First Amendment rights.").

As explained above, USTelecom and its member companies are supportive of the Commission's goals underlying these proposed requirements and would be interested in working with the Commission to explore options for achieving these that are less intrusive on core First Amendment rights.

Please include a copy of this ex parte in the record for the above-referenced proceeding.

Sincerely,

Glenn Reynolds
V.P. – Policy

Cc: Matthew Berry
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